Supreme Court, U.S.
FILED
FEB 5 1997
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(3)

No. 96-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RAAD QASGUARGIS, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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The petition explains that confusion pervades the federal courts over whether, to what extent, and where, final orders of deportation are judicially reviewable, notwithstanding § 440(a). The petition also demonstrates that the fundamental question of whether the Constitution guarantees judicial review of deportation orders is one of great importance and historical significance, and one that will impact thousands of pending and future deportation cases. Respondent does not take issue with these propositions. Nor does it offer *any* response to the constitutional authorities, cited and discussed by petitioner, which confirm that a lawful resident alien cannot constitutionally be deprived of their liberty without any opportunity to challenge the lawfulness of that deprivation in an impartial forum.

In fact, respondent's Brief itself acknowledges that judicial review of deportation orders is constitutionally guaranteed. However, it contends (without citation of Supreme Court authority) that the Constitution only guarantees such review of substantial constitutional claims under Article I, § 9. Respondent also argues that the Constitution guarantees no judicial review of final deportation orders even if they violate the laws of the United States or are the product of an abuse of discretion. Such arguments, at best, only go to the merits of the questions presented, and provide no basis for denying certiorari. More importantly, for the reasons explained at Pet. 7-18, the limited review proposed by respondent falls far short of that which is guaranteed by the Due Process Clause and Article III, given both the magnitude of the liberty interests at stake and the unacceptable probability of error the absence of judicial review.

In short, the Brief in Opposition offers nothing to diminish the significance of the fundamental constitutional questions presented in the Petition, or to minimize the compelling need for immediate review of those questions given the differing conclusions reached by the courts of appeals, and the drastic and irreparable consequences for lawful permanent residents like petitioner who now face imminent deportation.

1. In the petition, we demonstrated that the courts of appeals and district courts have reached differing conclusions concerning the extent to which judicial review of final orders of deportation is constitutionally guaranteed, and also the forum where such judicial review is to take place. Pet. 21-24. The Third Circuit, for instance, has held that judicial review cannot be precluded where "constitutional rights applicable to aliens may be at stake." *Salazar-Haro* v. *INS*, 95 F.3d 309, 311 (3d Cir. 1996). In *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), the First Circuit also recognized the "serious question" of § 440(a)'s constitutionality, and flatly rejected the government's

claim that the constitutionality of § 440(a) could simply be determined by reference to Congress' power over immigration:

> The question of section 440(a)'s constitutionality is not wholly resolved by reference to Congress' plenary power over matters concerning immigration. While it is true that "over no conceivable subject is the legislative power of Congress more complete," *Reno* v. *Flores*, [507 U.S. 292, 305 (1993)], the Supreme Court has also said that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and * * * we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." *Landon* v. *Plasencia*, [459 U.S. 21, 32-33 (1982)]. Given this recognition that continuously present aliens, like Kolster, do have some constitutional status, our analysis of whether judicial review is constitutionally required here cannot turn on the fact that section 440(a) only affects the rights of such aliens.

101 F.3d at 790 (citing *Salazar-Haro*, 85 F.3d at 311). In contrast, the Ninth Circuit has held that judicial review can constitutionally be abolished notwithstanding the Due Process Clause and Article III of the Constitution given Congress' power over immigration and the jurisdiction of the lower federal courts. *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996). Respondent's brief offers nothing to dispel this apparent confusion. Nor does respondent deny the enormous volume of ongoing litigation that now confronts the courts of appeals over the constitutional limit on Congress' power to preclude judicial

review of final orders of deportation, particularly against lawful permanent residents like petitioner.[1]

As Justice Scalia has noted, there is "[n]othing more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion). Indeed, to avoid such litigation, this Court in *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996), granted expedited review to determine the constitutionality of other jurisdictional provisions of the AEDPA dealing with habeas corpus review. In this case, the need for immediate review is every bit as compelling as it was in *Felker*. Specifically, there is an urgent need for this Court to decide whether, and to what extent, the Constitution guarantees resident aliens like petitioner the opportunity to challenge their final orders of deportation. The confusion over whether, and where, judicial review of deportation orders may be sought has had enormous practical consequences both for aliens facing imminent deportation, for their counsel, and for the courts—none of which have any clear understanding of where aliens may now go to challenge the lawfulness of a deportation order, or under what circumstances such review must constitutionally be made available.

Respondent's Brief does not address these consequences, let alone the magnitude of what is at stake for lawful resident aliens like petitioner who now face imminent deportation to places like Iraq, and permanent separation from their families, all without any prospect of impartial judicial review. The need for review of the questions presented also is especially immediate given that petitioner, and others like him who are similarly

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[1] As explained in the petition, § 440(a) also has caused confusion within the district courts regarding whether, and when, final orders of deportation are reviewable in habeas corpus. See, *e.g.*, *Mbiya* v. *INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996); *Powell* v. *Jenifert*, 937 F. Supp. 1245 (E.D. Mich. 1996); *Eltayeb* v. *Ingham*, 1997 WL 5906 (S.D.N.Y. Jan. 7, 1997).

situated, will forever lose the opportunity to seek judicial review after they have been deported. See *Stone* v. *INS*, 115 S. Ct. 1537, 1546 (1995). For them, immediate Supreme Court review represents their only chance for a meaningful resolution of the important constitutional questions presented.

In short, respondent's Brief all but ignores the compelling circumstances that demonstrate the need for this Court to determine whether § 440(a) is constitutional, and whether Congress constitutionally can deprive lawful resident aliens like petitioner of their liberty without judicial review.

2. Notably, respondent's Brief appears to concede that judicial review of final orders of deportation cannot constitutionally be eliminated. Respondent assumes, however, without citation to any Supreme Court precedent, that the Constitution only guarantees judicial review through habeas corpus under Article I, § 9, and only then "to redress significant violations of constitutional rights or ultra vires actions" of the Attorney General. Br. In Opp. 9 n.5. If anything, respondent's claim that judicial review should be limited to constitutional claims in habeas corpus proceedings only begs the questions presented, and at best is addressed to the merits, rather than to the need for Supreme Court review. In any event, while petitioner wholeheartedly agrees that habeas corpus review of deportation orders is constitutionally guaranteed by Article I, § 9, such review, by itself, is not constitutionally sufficient under the Due Process Clause or Article III.

If, as respondent argues, habeas corpus review is restricted to substantial constitutional claims, such review will be all but meaningless since the overwhelming majority of deportation cases (like this case) involve only statutory claims. According to respondent, if a final order of deportation is issued in violation of the Immigration and Nationality Act, or if the BIA's denial of statutory relief from deportation constitutes an

abuse of discretion, an alien would no judicial recourse—by habeas corpus or otherwise—to prevent their deportation even if such deportation were to violate the laws of the United States.

As explained in the petition, the Due Process Clause, as applied by this Court to resident aliens in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), guarantees judicial review because of the magnitude of the liberty interests at stake in deportation proceedings, and because of the unacceptably high risk of error in the absence of judicial review (a risk that respondent makes no attempt to deny). Pet. 7-11. Likewise, the Article III doctrine of separation of powers assures judicial review as a structural safeguard against "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)), and to ensure that the legal limits of governmental power are not judged by the very officials who seek to wield that power. *Gutierrez de Martinez* v. *Lamagno*, 115 S. Ct. 2227, 2233 (1995).

For all of these reasons, judicial review cannot constitutionally be limited only to substantial constitutional claims. Nor can final orders of deportation constitutionally be immunized from judicial scrutiny on the grounds they violate the laws of the United States, or are the product of an abuse of discretion. Without such forms of judicial review the risk of erroneous deportations and deprivations of constitutionally protected liberty interests will be unacceptably high. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (holding that "[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court"). As Judge Kozinski recently noted in explaining the need for judicial review of INS decisions, "agencies are run by people and people make mistakes. Review by a tribunal

outside the agency helps correct these rare but tragic errors. In the case of [aliens facing deportation], this may mean the difference between life and death; the effort is surely worth the candle." *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (concurring opinion).

Respondent argues, however, that the need for "judicial review is especially weak where, as here, the alien has conceded that he is deportable and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation." Br. in Opp. 8. To the contrary, the need for judicial review is *most* compelling when the question of eligibility for discretionary relief is at stake. Indeed, under § 440(a), aliens who seek statutory forms of relief such as asylum, withholding of deportation, suspension of deportation, and waivers of deportability, may be denied such relief for any reason, or no reason, without any measure of judicial scrutiny.[2]

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[2] Persons deportable for relatively minor offenses that do not rise to the level of an aggravated felony under § 101(a)(43) of the INA, are still be eligible for a variety of forms of statutory relief from deportation, including asylum, withholding of deportation, suspension of deportation and voluntary departure. The denial of such relief to such individuals, however, would no longer be subject to judicial review under § 440(a). For example, individuals convicted of petty drug offenses such as simple possession of a controlled substance are still eligible to seek political asylum, but because they would be deportable under 8 U.S.C. § 1251(a)(2)(B) would lose the ability to seek judicial review under § 440(a). Likewise, aliens deportable for committing two crimes of moral turpitude such as shoplifting or even bouncing a check (see *Matter of Khalik*, 17 I. & N. Dec. 518 (BIA 1980), would be eligible to seek asylum, withholding of deportation and other forms of relief, but would not be able to seek judicial review even if such relief is arbitrarily or unlawfully denied. It is no small irony that permanent residents who commit such relatively minor offenses actually would be the most likely to qualify for relief from deportation, and thus would have the greatest need for judicial review to guard against improper denials of such relief. Under § 440(a), however, it is precisely those aliens who would lose the ability to

These statutory forms of relief, however, were meant by Congress to serve as a means of protection against the threat or likelihood of persecution, or the guard against cases where deportation will result in extreme hardship to aliens and their families. While respondent may blithely discount the need for judicial review when such forms of relief are denied, it would be impossible to overstate "the importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman* v. *INS*, 98 F.3d at 432 (Kozinski, J., concurring).

Habeas corpus also would not provide a constitutionally sufficient means of guaranteeing judicial review since the INA provides no means of assuring that aliens who are taken into INS custody will have any opportunity at all to even seek habeas corpus review. In fact, § 440(c) of the AEDPA provides that as soon as the Attorney General takes a deportable alien into custody, she "shall deport the alien as expeditiously as possible." 110 Stat. 1277. Accordingly, the only aliens who will be able to seek habeas corpus review will be those who are able to get to the courthouse before they are deported—a disturbing fact given that most aliens are not even represented by counsel and will have no way of knowing where or how to seek habeas corpus review. In short, restricting judicial review only to those few lucky aliens who are able to get to the courthouse before they are quickly deported will result in a constitutional system of justice that is nothing more than what Chief Judge Posner has described as a game of "Gotcha!" *Czerkies* v. *U.S. Dep't of Labor*, 73 F.3d 1435, 1438 (7th Cir. 1996) (en banc). Such a limited and arbitrary system of review cannot serve as the exclusive means of judicial

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seek judicial review of such orders.

review guaranteed by the Due Process Clause of the Fifth Amendment and Article III.

Petitioner is not asking this Court to delineate the extent to which final orders of deportation are reviewable in habeas corpus. This is not a habeas case. The question before the Court, rather, is whether the Constitution guarantees lawful resident aliens the ability to seek judicial review of final orders of deportation on the grounds that such orders violate the laws of the United States and/or constitute an abuse of discretion. Section 440(a), on its face, takes away all avenues of judicial review over final orders of deportation, including habeas corpus. The important and unanswered question presented for this Court's review is whether Congress constitutionally can accomplish what it plainly has intended to do through § 440(a).

Respondent's claim that the Constitution should be read only to guarantee limited review of deportation orders through habeas corpus simply begs the question of § 440(a) constitutionality, and wrongly presumes that it is the responsibility of the courts to fashion a constitutionally sufficient framework of judicial review over final orders of deportation. To be sure, that is not this Court's obligation. If this Court holds that § 440(a) is unconstitutional, and that lawful resident aliens cannot constitutionally be deported and deprived of their liberty without judicial review, it will be up to Congress to decide how that constitutional guarantee is to be discharged.[3]

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[3] There is no indication either from the text or the legislative history of the AEDPA that Congress intended to shift the forum of judicial review from the courts of appeals under former § 106(a) of the INA down to the district courts, and thus to return to the system of review in place prior to the enactment of § 106 in 1961. See *Foti* v. *INS*, 375 U.S. 217 (1963). In fact, § 440(a) deleted § 106(a)(10) of the INA, which formerly provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

3. Respondent attempts to evade review in this case by suggesting that "the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requests." Br. in Opp. 10. In fact, respondent's own Brief confirms that this question is entirely premature and one that has no connection at all to the questions presented. As respondent's Brief explains, the BIA in *Matter of Soriano*, Interim Dec. 3289 (1996), held that notwithstanding § 440(d) of the AEDPA, the Attorney General has the authority to grant § 212(c) relief to aliens like petitioner who applied for such relief prior to the statute's passage. Accord *Reyes-Hernandez* v. *INS*, 89 F.3d 480 (7th Cir. 1996) (Posner, C.J.) (holding that § 440(d) did not apply retroactively to alien who applied for § 212(c) prior to § 440(a)'s passage).[4] The Attorney General has vacated *Soriano* pending her review of that

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[4] As *Soriano* and *Reyes-Hernandez* each demonstrate, respondent's argument concerning the applicability of § 440(d) is simply wrong. Under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), given the absence of any expressed congressional intent to apply § 440(d) to pending cases or to past conduct, the statute cannot be applied to render aliens like petitioner who previously applied for relief from deportation retroactively ineligible for such relief based upon convictions that were entered long before § 440(d) was enacted since to do so would attach "new legal consequences to events completed before its enactment." *Id.* at 270. The fact that, as respondent argues, deportation has prospective consequences is irrelevant since the alien's eligibility for relief from deportation is "quintessentially backward-looking." *Landgraf*, 511 U.S. at 282. The inquiry under § 212(c) turns entirely upon the alien's past conduct (*Reyes-Hernandez*, 89 F.3d at 493)—as does the applicability of § 440(d) itself. In *Landgraf*, this Court held that the compensatory damage remedies of the 1991 Civil Rights Act could not be applied retroactively since the availability of such relief turned solely on past conduct, and "would attach an important new legal burden to that conduct." 511 U.S. at 283. In this case, § 440(d) likewise would attach an important new legal consequence to convictions entered prior to § 440(d)'s passage by rendering the alien ineligible for relief from deportation based on the hardship that deportation would impose on both the alien and his/her family.

decision. Should the BIA's decision in *Soriano* be affirmed, the issue raised by respondent will never arise.

In any event, the question of whether the Attorney General has the power to grant petitioner the relief that he seeks is one that only will need to be addressed on remand to the BIA should this Court decide that the Sixth Circuit in fact possessed jurisdiction to consider his appeal. The ultimate resolution of that question also may well turn upon this Court's decision in *Lindh* v. *Murphy*, 117 S. Ct. 726 (Jan. 10, 1997) (No. 96-6298), in which this Court granted certiorari to determine whether other remedial provisions of the AEDPA dealing with habeas corpus review should be applied to prior pending cases. At this stage, it suffices to say that the difficult question of whether § 440(d) of the AEDPA applies retroactively to petitioner is one that has no connection to the questions presented, and in no way diminishes the propriety or need for Supreme Court review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1997